



(5)  
No. 88-234

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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FLORIDA POWER & LIGHT COMPANY, *et al.*,  
v. *Petitioners,*  
UNITED STATES OF AMERICA and  
UNITED STATES NUCLEAR REGULATORY COMMISSION,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**PETITIONERS' REPLY TO  
RESPONDENTS' MEMORANDUM**

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October 20, 1988

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In their Memorandum For The Respondents, the Government Respondents point to this Court's October 3, 1988 action noting probable jurisdiction in *Burnley v. Mid-America Pipeline Co.*, No. 87-2098, and to the similarity of the issues in this case and in *Mid-America*. Respondents suggest that "this case should be held pending the Court's decision in *Burnley v. Mid-America Pipeline Co.* and disposed of in light of that decision." Memorandum For The Respondents at 5.

Petitioners disagree and submit that the Court's consideration of the issues posed by user fee statutes and proper administration of the somewhat different statutes at issue in the two cases will be best served by granting the instant petition and considering it together with *Mid-America*. The Court followed a similar course in *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). In

those cases, certiorari petitions, filed at different times from conflicting decisions of the Fifth and District of Columbia Circuits and interpreting the fees provisions of the Independent Offices Appropriations Act of 1952 ("IOAA"), 31 U.S.C. § 9701 (1982), were granted on the same day and set for argument together. *See* 411 U.S. 981 (1973); 411 U.S. 983 (1973).

Both this case and *Mid-America* implicate the growing practice of Congress to delegate to executive and administrative agencies authority to raise revenues from individuals and entities subject to the agencies' regulatory authority.<sup>1</sup> The Solicitor General recognized the common nature of the problems in the Jurisdictional Statement in *Mid-America* (at 7) when he described that case and this as involving "a similar constitutional challenge," and in the Memorandum For The Respondents (at 5) herein when he stated that "the legal challenges in this case and *Mid-America Pipeline* are analogous." There is a conflict between the courts below concerning the appropriate disposition of that challenge.

The questions presented by the two cases are substantial<sup>2</sup> and involve constitutional restrictions on the delegation of powers, particularly on delegation of the power to tax, and their relationship to statutory interpretation. *See, e.g., Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-87 (1980) (Rehnquist, J. concurring in the judgment); *Synar v. United States*, 626 F. Supp. 1374, 1385-86 (D.D.C.) (three-judge panel) (*per curiam*), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *National Cable Television Ass'n*, 415 U.S. at 336; *New England Power Co.*, 415 U.S. at 345.

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<sup>1</sup> Six examples are cited in the Petition in this case, at 6-8.

<sup>2</sup> The Government Respondents agree that the questions involved are substantial. *See* Jurisdictional Statement, *Burnley v. Mid-America Pipeline Co.*, No. 87-2098 (June 23, 1988), at 7-8.

Even though the cases involve essentially similar basic questions, they are not identical, and the differences may be significant to delineating the limits on the delegation of taxing power. This case and *Mid-America* involve different sections of the same Act. *Mid-America* involves section 7005 of the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 82, 140-41 (1986) (to be codified at 49 U.S.C. app. § 1682a), respecting fees related to usage of natural gas and hazardous liquid pipelines. This case involves section 7601, 100 Stat. 82, 146-47 (1986) (to be codified at 42 U.S.C. § 2213), relating to annual charges imposed upon licensees by the Nuclear Regulatory Commission. The legislative "standards" purportedly to be applied by the agency to which the power to assess fees is delegated<sup>3</sup> and the amount to be collected<sup>4</sup> differ. In addition, this case also raises significant questions of statutory interpretation which are not raised in *Mid-America*. Consequently, addressing the cases together or in close proximity may add a perspective helpful to considered judgment by the Court in providing comprehensive guidance to Congress.

Finally, Respondents' suggestion to defer this case pending a determination in *Mid-America* involves potential significant disadvantages in terms of delaying a final decision in this case. A not unlikely consequence of adopting the Respondents' suggestion is that after the decision is issued in *Mid-America* — and that would probably be no earlier than next spring — this case would be remanded to the court below and

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<sup>3</sup> *E.g.*, "a reasonable relationship to volume-miles, revenues or an appropriate combination thereof . . ." (COBRA, § 7005(a)(1)); "reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." (COBRA, § 7601(b)(1)(A)).

<sup>4</sup> *E.g.*, "sufficient to meet the costs of . . ." designated activities (COBRA, § 7005(d)); not to exceed an amount which, together with certain other fees, "is estimated to be equal to 33 percent of the costs incurred by the Commission . . ." in the fiscal years affected. (COBRA, § 7601(b)(1)(A)).

be followed by proceedings in that court involving still another extended period of time. The result might well be to leave Congress uncertain as to the limits of user fee legislation for another fiscal year.

For the foregoing reasons, we respectfully suggest that the Court give consideration to granting the instant Petition at this time and hearing argument together with or closely following *Mid-America*. In making this suggestion, Petitioners are aware that, in order to avoid delay in handling *Mid-America* or other matters, Petitioners may have to meet an expedited briefing schedule, and are prepared to do so.

Respectfully submitted,

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